



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JUNE 06, 2023

IN THE MATTER OF:

Appeal Board No. 607596

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determinations (including September 27, 2017, and December 12, 2018), effective 3rd quarter 2013 through 4th quarter 2016, assessing (hereinafter "employer" or "Absolute") liable for tax contributions, based on remuneration paid to nurses and estimated remuneration of corporate officers included in the audit as employees, and based on the fraud penalty pursuant to Labor Law § 570(4).

Objecting to the initial determinations, the employer requested a hearing.

The Administrative Law Judge held telephone conference hearings at which testimony was taken. There were appearances on behalf of the employer and the Commissioner of Labor. By decision filed July 8, 2019 (A.L.J. Case No.), the Judge modified the initial determinations by excluding all nurses from the audit, including the estimated remuneration of the corporate officers, and modifying the amount of the concomitant fraud penalty not inconsistent therewith.

The employer and the Commissioner of Labor cross-appealed to the Appeal Board.

By remand order filed February 16, 2021, the Board ordered a further hearing. A telephone conference hearing was held at which evidence was taken. There were appearances on behalf of the employer and the Commissioner.

By remand order filed April 11, 2023, the Board ordered another hearing. A telephone conference hearing was held at which evidence was taken. There were appearances on behalf of the employer and the Commissioner.

The Board considered the arguments contained in the written statements submitted on behalf of the employer and the Commissioner.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: Absolute is a licensed home healthcare services agency that provides skilled nursing care to clients in their homes. Absolute obtained prior approval from Medicaid to treat any Medicaid and Medicaid Managed Care clients before introducing licensed practical nurses (LPN) and registered nurses (RN) to its clients.

NURSES

During the relevant period, Absolute found nurses through word-of-mouth via flyers provided to nurses for distribution. Absolute asked new candidates for specified documentation, including legally mandated verification of a nursing license from the New York State Department of Education. Upon satisfaction of the submitted documentation, nurses executed Absolute's Independent Contractor Agreement, which provided, in part, that the nurse shall:

1. Provide nursing services to Absolute's clients by applying the therapeutic modalities of their profession. Service will be rendered at the frequency and duration directed by Absolute in accordance with the identified client's need, desire, professional assessments and in collaboration with the client's authorized medical practitioner. Hours of service shall be determined by the client's need.
2. Perform evaluations and participate with Absolute, the client's physician, the client, and the client's family in the development of the treatment plan which includes therapeutic goals and expected length of service.
3. Report abnormalities and injuries of Absolute clients immediately and follow the appropriate Absolute policies as directed by the coordinating RN.
4. Notify Absolute immediately in the event of a personal emergency, illness, vacation, or holiday so that a substitute can be obtained if necessary.
5. Submit a list of in-service / continuing education and seminars attended annually.

6. Comply with NYS Rules and Regulations for health care workers, including documentation of current professional licensure, educational preparation, current physical examination and health history, rubella titer, measles status, PPD status, professional liability insurance coverage, two professional references, and proof of US citizenship/appropriate immigration documentation. Present documentation of freedom from any health impairment, drug/alcohol habituation that is of potential risk to Absolute clients or that may interfere with the performance of professional duties.

7. Submit invoices for services rendered within seven (7) working days following the week in which services were rendered. No fees or charges will be collected directly from clients or their families for services rendered.

8. Not assign any right or obligation under this agreement, or subcontract, or employ another to provide the services agreed upon under this contract.

9. Make available upon request to the governmental entities, for inspection, audit, and reproduction, any documents and records concerning the services provided to Absolute's clients for a period of four years following the provision of these services.

10. Assume full responsibility for and make all payments under federal and state social security, workers' compensation, unemployment compensation, and income tax regarding compensation received.

11. Hold harmless and indemnify Absolute from all expenses, claims, lawsuits, and judgments, which Absolute may become liable to pay or defend because of the act or failure to act by the nurse.

12. Maintain the confidentiality of all Absolute records.

Absolute offered various placements to nurses who could decline without repercussion. If accepted, nurses and clients scheduled and held an initial interview between themselves to determine mutual acceptability. Once accepted by both individuals, they agreed to a schedule of service hours. The nurse provided service in accordance with the plan of care developed by the client's physician - the nurses duties were based on the physician's orders that were kept in the treatment plan binder at the client's home. A client's physician could modify any treatment plan, a copy of which the physician provided to Absolute. Nurses submitted any progress notes and weekly timesheets

countersigned by the clients.

Absolute's clients were not exclusive to Absolute - they could be serviced by multiple nurses from multiple agencies, as well as nurses not associated with any agency. Some nurses worked for multiple clients or agencies. If a nurse needed to alter a scheduled visit, the nurse advised the client. If a substitute was needed, nurses arranged with another nurse to fill-in as a substitute without informing Absolute. These substitutes could be nurses who may or may not be associated with Absolute. As a last resort, if a nurse was unable to find coverage, the nurse contacted Absolute to find coverage. If a nurse found a substitute not associated with Absolute to service a client, then Absolute did not bill the client for such services - the client was billed for services only by nurses associated with Absolute.

Absolute provided nurses with no fringe benefits, no office space, no tools or equipment, no expense reimbursement, and no identification card. Absolute required no meetings or training beyond their professional licensure requirements. Nurses could work as much or as little as they wished. They had their own liability insurance, as well as their own equipment and tools (e.g., stethoscopes, pulse oximetry, gloves, and other personal protective equipment). Nurses were prohibited from neither competing with Absolute nor soliciting its clients. Some nurses competed and solicited Absolute's clients.

Medicaid has different reimbursement rates for adult and pediatric patients, and for RNs and LPNs. If Medicaid's reimbursement rate was \$32 per hour, Absolute offered nurses an hourly rate of \$30, which could be negotiated. Medicaid rules and regulations required, in part, that an agency shall maintain liaison with nurses providing care and service to assure that delivered care planning and service are coordinated, supervised, and integrated effectively into the requisite patient services responsibilities; that the client shall verify nurse's work hours; and that an agency shall maintain records for four years. Except for the Medicaid mandated annual evaluation, Absolute did not evaluate nurse's performance. Absolute submitted requisite documentation to, and handled the billing and collection from, Medicaid and insurance companies that paid Absolute monthly. Absolute paid the nurses weekly via its third-party payroll administrator (Paychecks). All nurses had their own Federal Employer ID Number (FEIN) and identified themselves as sole proprietors. Absolute issued IRS 1099 forms to its nurses.

CORPORATE OFFICERS

Absolute is owned and operated by two principal shareholders/officers, Patricia BB and Mignon GP, who each owned 50% of the business since its inception in 1988. Since that time, the business employed

administrative staff to handle the day-to-day operations. During the audit period, each principal received their equal share of the profits from Absolute via IRS K-1 forms as follows: \$4,185 in 2013; \$3,060 in 2014; \$4,475 in 2015; and \$5,067 in 2016.

During the entire audit period, Patricia communicated with the office staff via a call or an email here and there. She also made occasional visits to the office to sign paperwork. For the years 2013 and 2014, Mignon provided no services for Absolute.

During the entire audit period, Patricia was employed full-time for other entities, including the Mount Sinai Beth Israel Hospital where she worked as a nurse manager with 24-hour responsibility working 70 to 85 hours per week, and the Visiting Nurse Service of New York where she worked as a nurse manager working 50 to 60 hours per week. She received the following W-2 statements from these other entities: \$104,069 in 2013; \$99,880 in 2014; \$14,516 and \$67,071 in 2015, and \$110,401 in 2016. Also, Patricia was a Captain in the Army Reserve wherein she participated in annual training that lasts for two or more weeks, and in monthly weekend-long drills plus mandated homework.

During the audit period, Mignon was employed full-time as a nurse manager with 24-hour responsibility at a Mount Sinai hospital where she worked 50 to 100 hours per week, and she received the following IRS W-2 amounts: 2013 \$94,251; 2014 \$98,809; and 2015 \$72,238. In or about September 2015, she retired from the full-time nurse manager position. Thereafter, she worked per diem for the same hospital.

Commencing from the last quarter of 2015, Mignon provided Absolute with consulting services for about one to three days per week, one hour or four hours per day. Such assistance included "assisting staff in acquiring" from Medicaid Managed Care (insurance) companies its service contracts to ascertain their reimbursement "rates", and advising the administrator on various tasks, e.g., "writing clinical policies to ensure compliance with these [newly acquired] companies". For 2015, Absolute did not issue a W-2 but issued Mignon an IRS 1099 in the amount of \$35,796 for these consulting services. Effective January 2016, Mignon took over the role as Absolute's managing director to

handle the day-to-day operations. For 2016, Absolute issued Mignon an IRS W-2 in the amount of \$15,750.

AUDIT

The Department of Labor conducted an audit of Absolute's books and records. Due to incomplete records, including disbursement records, the Department estimated remuneration for both officers for parts of the period and obtained actual payments from Absolute's annual payroll summary for other parts of the period as follows:

AUDIT PERIOD

PATRICIA

MIGNON

2013 QTRS 3 & 4

ESTIMATE: 4,250

(8,500/yr.)

ESTIMATE: 4,250 (8,500/yr.)

2014

ESTIMATE: 10,300

ESTIMATE:

10,300

2015

ESTIMATE: 10,500

PAYROLL SUMMARY: 35,796

2016

PAYROLL SUMMARY:

15,750

PAYROLL SUMMARY: 153,726

Regarding the nurses, the Department's field report identified that Absolute's annual payroll summary recorded the same information as the actual 1099 forms. Rather than scheduling all the 1099 forms for the nurses in the audit report, the Department captured the information from the annual payroll summary. The Department included 270 nurses as an "overall count of misclassified individuals", which did not include nurses Joycelyn C and Monica S who were determined to be employees (respectively effective 2006 and 2008) of Absolute by prior initial determinations that remain in effect.

In support of the fraud penalty assessment, the instant initial determinations recite, in part, the Department's September 22, 2016 notice, properly

addressed to Absolute, which informed Absolute that a Judge sustained the initial determination holding the "officers and nurses" who performed services for Absolute during a prior audit period (1st quarter 2012 through 2nd quarter 2013) to be employees, and that Absolute "must file corrected reports" to include their "remuneration within twenty days from the date of this letter." Regarding Absolute's appeal of this decision, the Court ultimately affirmed the Appeal Board denying Absolute's application to reopen a prior decision¹ that sustained the initial determination (Matter of Absolute Home Health Care, Inc., 199 AD3d 1135 [3d Dept 2021]). The Department also relied on Absolute's failure to provide all requested records for the entire audit period.

OPINION: The credible evidence fails to establish that Absolute exercised, or reserved the right to exercise, sufficient supervision, direction, or control over the nurses' services to hold an employer-employee relationship. Significantly, Absolute merely verified that new candidates were licensed but did not otherwise screen them; nurses could decline offered work without repercussion; the non-exclusive clients interviewed and chose the nurses; the clients and nurses set their own service schedules; and the nurses followed the physician's plan of care that was maintained at the client's home. Without informing Absolute, changes to the service schedule were handled between the nurses and clients, and the nurses found their own substitute nurses who were not required to be associated with Absolute. Nurses had their own liability insurance, equipment, and tools; nurses were free to and some nurses did work for competitors; and some nurses solicited Absolute's clients. Absolute had to comply with various Medicaid rules and regulations, including many of the requirements enumerated in the Independent Contractor Agreement. Under these circumstances, we conclude that the case at hand is much like the medical professionals in the Matter of Mulholland (Motherly Love Care, Inc.), 258 AD2d 855 (3d Dept 1999) where an RN provided services through Motherly Love via a written agreement identifying her as an independent contractor. Therefore, the nurses engaged by Absolute should be excluded from audit assessment. See also, Matter of HTA of New York, Inc., 255 AD2d 733 (3d Dept 1998); and Matter of Tulumello (Coastal Emergency Services of Rochester, Inc.), 211 AD2d 852 (3d Dept 1995).

We are not persuaded by the Commissioner of Labor's contention that certain factors are significant. For example, having timesheets countersigned by clients is merely a means to verify proper payment to the nurse and charges to the client's reimbursement provider. The Court has found attendance verification not determinative in Matter of Mulholland (Motherly Love Care,

Inc.), 258 AD2d 855 (3d Dept 1999). The Commissioner also contends that nurses were required to adhere to the employer's plan of care. However, Absolute did not set the plan of care for nurses to follow. See *Matter of Mulholland* (id.). Rather, the undisputed evidence demonstrates that the client's physician developed the plan of care through the physician's orders that were kept in the treatment plan binder at the client's home.

Further, while the record may contain some right of control, the Commissioner has not refuted Absolute's evidence that many of the requirements, like retention of records and other provisions set out in the Agreement, were mandated by numerous state and federal laws and regulations.² Even if some of the items were not mandated by regulation, the case at hand remains very similar to *Matter of Mulholland* (id.). See also *Matter of Cruz* (Strikeforce Staffing LLC), 204 AD3d 1348 (3d Dept 2022); *Matter of Desravines* (Logic Corp.), 146 AD3d 1205 (3d Dept 2017); *Matter of TMR Security Consultants, Inc.*, 145 AD3d 1402 (3d Dept 2016);

and *Matter of Berger* (Gail & Rice, Inc.), 143 AD3d 1024 (3d Dept 2016). Moreover, the Court has found insufficient control above and beyond various mandated regulations, like Medicaid rules, to establish an employment relationship. See e.g., *Matter of Giordano* (Tender Age PT Inc.), 161 AD3d 1398 (3d Dept 2018); *Matter of Bogart* (LaValle Transportation, Inc.), 140 AD3d 1217 (3d Dept 2016); *Matter of Wannan* (Andrew Garrett Inc.), 57 AD3d 1029 (3d Dept 2008); and *Matter of International Student Exchange, Inc.*, 302 AD2d 834 (3d Dept 2003). Accordingly, we conclude that the evidence does not support that Absolute exercised sufficient control over the nurses' work to establish an employer-employee relationship.

CORPORATE OFFICERS

Generally, corporate net income distributed to officers as K-1 profits may be considered remuneration to a corporate officer who performed services for the corporation but received no salary, notwithstanding any re-investment of such income back into the business. See *Matter of JD Station Plaza Realty Inc.*, 127 AD3d 1451 (3d Dept 2015); and *Matter of Ellenbogen Computer Services Inc.*, 202 AD2d 825 (3d Dept 1994). As Mignon performed no services for Absolute in 2013 and 2014, she is not deemed to have received remuneration for these years. Therefore, the Department's estimated officer remuneration for Mignon should be disregarded for 2013 and 2014. However, Mignon performed services in 2015 and 2016, and Patricia performed services for the entire period at issue. Notwithstanding the receipt of W-2 earnings from other entities, Patricia's

K-1 net earnings for 2013, 2014 and 2015 are deemed remuneration for purposes of tax contributions. As the actual K-1 net income is more determinative than the estimated 2013, 2014 and 2015 officer remuneration for Patricia, the Department should replace them with the respective K-1 income. As the attributed officer remuneration from Absolute's annual payroll summaries for Patricia in 2016, and for Mignon in 2015 and 2016, exceed the annual wage limit (e.g., \$8,500) for each officer in the remaining audit period, there is no reason to disturb those amounts.

FRAUD

Labor Law § 570(4) provides that an employer is subject to the penalty if "any

part of any deficiency is due to fraud with intent to avoid payment of contributions". By its January 27, 2016 hearing default, Absolute knew or should have known that a Hearing Judge sustained the relevant initial determination, for a prior audit period, holding the "officers" who performed services for Absolute must be reported as employees. At the very least, the Department's September 22, 2016 communication placed Absolute on notice of such outcome. Even if Absolute might not have known to include K-1 net earnings as reportable remuneration, they failed to report the \$35,796 in earnings for services Mignon provided in the third quarter 2015. Under these circumstances, the Commissioner had a basis to find that at least some part of the underpayment was due to fraud with intent to avoid payment of contributions. See *Matter of Body Electric Corp. of America*, 89 AD3d 1331 (3d Dept 2011); *Matter of Mamash Restaurant Corp.*, 270 AD2d 723 (3d Dept 2000); and *Matter of Executive Education Institute Inc.*, 270 AD2d 601 (3d Dept 2000). Accordingly, the concomitant fraud penalty is not unreasonable and should be sustained.

DECISION: The decision of the Administrative Law Judge (A.L.J. Case No.) is modified, and as so modified, is affirmed.

The initial determinations, effective 3rd quarter 2013 through 4th quarter 2016, assessing liable for tax contributions, based on remuneration paid to nurses and estimated remuneration of corporate officers included in the audit as employees, and based on the fraud penalty pursuant to Labor Law § 570(4), is modified in accordance with this decision

and, as so modified, is sustained, namely, as follows:

- * The nurses shall be excluded from the audit.
- * Regarding Patricia, the estimated officer remuneration in 2013, 2014, and 2015 is replaced with the actual K-1 net income for the respective years; and amount from the annual payroll summary for 2016 remains in effect.
- * Regarding Mignon, the estimated officer remuneration in 2013 and 2014 is disregarded; and amount from the annual payroll summary for 2015 and 2016 remains in effect.
- * The concomitant fraud penalty remains in effect.

The employer is liable, in part, with respect to the issues decided herein.

The amounts of the additional contributions due and the concomitant fraud penalty are referred to the Department of Labor for recalculation not inconsistent with this decision.

MARILYN P. O'MARA, MEMBER

1 Absolute defaulted at hearing in 015-25659 filed January 27, 2016.

2 For example, see Licensed Home Care Services Agencies - Minimum Standards (10 NYCRR Part 766); and Grants to States for Medical Assistance Programs (42 CFR Part 430).

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